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VALIDITY OF A NEGOTIABLE NOTE IN THE HANDS OF A BONA FIDE PURCHASER FOR VALUE WHERE THE TRANSACTION OUT OF WHICH IT AROSE IS DECLARED VOID BY STATUTE.—It is the distinguishing characteristic of negotiable paper that when a contract takes that form, it is not, in the hands of a bona fide holder, subject to a defense which would avoid it in the hands of the original parties.¹ No matter how illegal or immoral the consideration of a note or bill may be, it is valid in the hands of a bona fide holder unless expressly declared void.² The reason for this is obvious. A negotiable instrument is "a courier without luggage, whose countenance is its passport." If equities between the parties were allowed to follow the instrument it would seriously embarrass mercantile transactions, because these covert defects, were they allowed to attach themselves to and follow the instrument, would effectively stop its circulation.³

This peculiar protection which the law extends to the innocent holder, who for value in due course has received negotiable paper, is of no avail when a statute in express terms, or by unavoidable implication, has pronounced the instrument void, unless there is some other statute which modifies or repeals the former statute. Where a statute declares a note void, it need make no mention of

¹ Union Trust Co. v. Preston National Bank, 136 Mich. 460, 99 N. W. 399, 4 Ann. Cas. 347.

² American National Bank v. Madison, 144 Ky. 152, 137 S. W. 1076, 38 L. R. A. (N. S.) 597.

³ DANIEL, NEGOTIABLE INSTRUMENTS 197.

bona fide holders; being a void instrument in its inception, negotiation cannot imbue it with life, and it remains void for all purposes.⁴ Numerous decisions, construing statutes which make all contracts or notes, whose consideration is money won at gambling, absolutely void, hold that such notes are of no effect, no matter into whose hands they may come.⁵ But these statutes will not be extended to cover cases not expressly provided for. The consideration of the notes must be the money embarked in the gambling transaction. In one of the leading cases on this question notes given to take up checks for money lost in gambling were held valid and enforceable in the hands of a bona fide purchaser, because the consideration of the notes was not itself to be used in gambling.⁶ But a bona fide holder may enforce the liability of an endorser on a note declared void, as for gambling, because the indorsement is a separate contract by which the endorser warrants the validity of the original contract.⁷ Intimately connected in this particular with gambling contracts are notes upon which usurious interest has been exacted. As a general rule these are held void under statutes so declaring, even in the hands of bona fide purchasers.⁸

The propositions laid down above regarding negotiable instruments declared void by statute or instruments based upon an illegal consideration may be taken as settled by the weight of authority. But when we come to consider the cases where the transaction is merely forbidden by statute or made a crime, the courts are in conflict. There are numerous cases holding that where a statute makes a violation thereof a crime, a contract made in violation thereof is illegal and there can be no recovery thereon, although the statute does not expressly prohibit the contract or make it void.⁹ In regard to negotiable instruments, the prevailing view seems to be that where the law merely declares illegal the acts or transactions giving rise to a bill or note, the instrument is not void in the hands of a holder in due course. In such a case the distinction between notes void and voidable must be made; if void, then the negotiation will not affect the validity of the notes; but where merely voidable, as where the act upon which they arose was prohibited by statute or made a crime, then negotiation cuts off the latent equities and the instrument is

⁴ *Voreis v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; *Hanover National Bank v. Johnson*, 90 Ala. 552, 8 South. 42; *Lawson v. Bank* (Ky.), 102 S. W. 324.

⁵ *Haight v. Joyce*, 2 Cal. 64, 56 Am. Dec. 311; *Snoddy v. American National Bank*, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705; *Chapin v. Duke*, 57 Ill. 296.

⁶ *Higginbottom v. McReady*, 183 Mo. 96, 81 S. W. 883, 105 Am. St. Rep. 461; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432; *Jones v. Sevier*, 1 Litt. (Ky.) 50, 13 Am. Dec. 218.

⁷ *Fish v. First National Bank*, 42 Mich. 203, 3 N. W. 849.

⁸ *Bluthenthal v. City of Columbia*, 175 Ala. 398, 57 South 814; *Sabine v. Paine*, 151 N. Y. Supp. 735; *Ward v. Sugg*, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280.

⁹ *Texarkana R. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 56 S. W. 944; *Pinney v. National Bank*, 68 Kan. 223, 1 Ann. Cas. 331; *Stanley v. Nelson*, 28 Ala. 514.

valid and enforceable in the hands of a bona fide holder, notwithstanding the fact that the transaction out of which the note arose was declared illegal and prohibited.¹⁰

In the recent case of *Whitehead v. Coker* (Ala.), 76 South. 484, suit was brought by a bona fide holder, on a note given to a physician for services rendered. The physician was practicing without a certificate of qualification, which was a violation of a criminal statute of the state. There was also a statute in effect which prohibited such physician from recovering compensation for his services. In an action on the note recovery was denied. In reaching this decision the court construed together the two statutes above mentioned and drew therefrom the inference that the contract was void by *necessary implication*. But in so doing, it seemed to have lost sight of the distinction between contracts prohibited by statute and contracts expressly declared void. The transaction out of which the note arose was illegal and was forbidden, but contracts arising from such transaction were not expressly declared void. The rule as laid down by the overwhelming weight of authority—as shown above—is that a note arising out of a transaction prohibited or declared illegal loses by negotiation to a bona fide holder the taint in its consideration. If this rule were applied to the facts in the principal case, it would seem that the holding is unsound, because there is no express declaration that the contract shall be void, but only a prohibition on the transaction from which the note arose.¹¹ A case parallel to the instant case is that of *Citizens' State Bank v. Nore*,¹² where statutes almost identical in meaning and terms with the statutes in this case were construed to render the note voidable only and hence enforceable in the hands of a bona fide holder for value.

In the opinion of the principal case no mention was made of the provisions of the Negotiable Instruments Law in effect in Alabama. Section 57 of that act provides that: "A holder in due course holds that instrument free from any defect of title of prior parties and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties thereon." If we consider the note as merely voidable because arising from a transaction prohibited and declared illegal, then the above provision would undoubtedly make the note enforceable in the hands of a bona fide holder. And even if a forced construction were put on the criminal statute and the note were to be considered void, it would seem that the above provision would cover the case, making the note enforceable in the hands of a bona fide holder.

However, the courts are in conflict on this question. One line of

¹⁰ *Press Co. v. Hartford Bank* (C. C. A.), 58 Fed. 321; *Lynchburg National Bank v. Scott*, 91 Va. 652, 22 S. E. 487; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28; *Union Trust Co. v. Preston National Bank*, *supra*.

¹¹ See authorities cited in footnote 10, *infra*.

¹² 67 Neb. 69, 93 N. W. 160, 60 L. R. A. 737.

cases holds that the above provision of the Negotiable Instruments Law does not affect the case where the note is expressly declared void by statute. These courts by reading the two statutes together hold that the intention of the legislature must have been to leave the former general statute in full force. In determining the meaning of a statute, they presume, in the absence of words specifically indicating the contrary, that the legislature did not intend to unsettle, disregard, or alter the common law or a statute whose entire subject matter is not directly or necessarily involved in the subsequent act. Hence, they say that the legislature did not intend by passing the Negotiable Instruments Law to repeal, expressly or by implication, the general statute declaring a note void, because the two as read together are not repugnant and the entire subject matter of the general statute is not covered by the Negotiable Instruments Law. This in effect excludes the operation of the Negotiable Instruments Law from those cases where the contract is declared void by statute, and leaves it applicable only to paper which might have been obligatory between the original parties.¹³

But in direct conflict with the view above, we find cases that hold on similar principles of law that the Negotiable Instruments Law does by implication repeal such statutes as interfere with its provisions. The object in passing the Negotiable Instruments Law was to establish uniformity in the rules governing negotiable paper, and to free it from all latent defects and infirmities that would otherwise inhere in it to the prejudice of innocent holders. This could not be effected so long as the negotiable instrument was rendered null and void by state statute. To allow such statutes to stand would be going contrary to the purpose and intent of the Negotiable Instruments Law. And where two statutes are repugnant in any of their provisions, the later act, without any express clause of revocation, operates to repeal the former. Even if the two statutes are not in express terms repugnant, where the later act covers the whole subject of the first and embraces new provisions plainly showing that it was a substitute for the first act, it will operate as a repeal of the former act.¹⁴ Hence, where a note, void by statutory provision between the original parties, comes into the hands of a bona fide holder the Negotiable Instruments Law operates to repeal the statute invalidating it, in so far as the statutes are conflicting, because the provisions of the Negotiable Instruments Law in meaning and effect annul the former act. This at once frees the note from its old infirmities and gives it new life in the hands of the bona fide holder.¹⁵

While it might be contended that this construction of the Nego-

¹³ *Coal & Coke R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Eskridge v. Thomas* (W. Va.), 91 S. E. 7; *Exchange Bank v. Henderson*, 139 Ga. 260, 77 S. E. 36; *Lawson v. Bank* (Ky.), 102 S. W. 324; *Bluthenthal v. City of Columbia*, *supra*.

¹⁴ *Davies v. Fairborn*, 3 How. (U. S.) 636; *United States v. Tynen*, 11 Wall. (U. S.) 88.

¹⁵ *Wirt v. Stubblefield*, 17 App. D. C. 283; *Schlesinger v. Lehmanier*, 191 N. Y. 69, 83 N. E. 657; *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619; *Klar v. Kostik*, 119 N. Y. Supp. 683.

tible Instruments Law carries the doctrine of implied revocation too far, it would seem on principle that this is the better construction of the two. One of the primary purposes of the Negotiable Instruments Law was to protect the bona fide holder. If the latter construction is adopted this purpose will be carried out, but if the former is adopted the bona fide holder will be made to suffer for the illegal acts of the original parties to the transaction, who thereby escape liability.

THE RIGHTS OF AN EQUITABLE TITLE-HOLDER IN COURTS OF LAW IN VIRGINIA.—A sharp distinction was maintained in olden times between legal and equitable rights, and this was due to the jealousy that the judges of the common law courts felt for this new system. As a result, the courts of law absolutely ignored equitable rights, and a legal title was necessary to obtain recognition in the law courts. In many of the United States the introduction by statute of equitable defenses in courts of law has to a great extent modified the common law conceptions, and in these jurisdictions the sharp line between law and equity is gradually disappearing.

The case of a mortgage or deed of trust is a striking illustration of this modification. The earlier and present English doctrine is that the mortgagor transfers the legal estate to the mortgagee, and there remains in the mortgagor only an equitable estate, commonly called the equity of redemption.¹ As was said by Lord Kenyon in *Goodtitle d. Jones v. Jones*:²

“* * * this was a mortgage term created in favor of the mortgagee. But in a Court of Law we cannot take cognizance of trusts; and we should be confounding the boundaries between the different Courts, if we allow the plaintiff below [the mortgagor’s remote devisee] to recover in ejectment where there is a legal estate in another person.”

The modern departure from this theory, which is the rule in most of the code States, particularly the western States of the United States, practically reverses the situation of the parties. Under this theory the mortgagor still retains the legal title, and passes to the mortgagee only the right, on default to sue in equity for foreclosure, or to compel the sale of the property by the trustee, as the case may be. The basis of this change is upon the theory that the mortgage is in the nature of a mere lien to secure the debt; the debt is the principal fact, the mortgage is wholly incidental and collateral thereto, and is intended only to secure its payment; the mortgage is a lien following the land by means of which the land may be condemned to satisfy the debt.³ In *Dutton v. Warschauer*⁴ Judge Field said:

¹ *Doe v. Staple*, 2 T. R. 684; COOTE, MORTGAGES 339, and cases cited.

² 7 T. R. 43.

³ *Dutton v. Warschauer*, 21 Cal. 609; *McMillan v. Richards*, 9 Cal. 365; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 538; *Gardner v. Heartt*, 3 Denio (N. Y.) 234.

⁴ *Supra*.